In The

Supreme Court of the United States

October Term, 1978

No. 78-160

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, Darrell L., Harold, Harold M. and Luea Sorenson,

Petitioners,

No. 78-161

R. G. P. Incorporated, Otis Peterson, and Travelers Insurance Company,

Petitioners,

No. 78-162

State of Iowa and State Conservation Commission of the State of Iowa,

Petitioners,

vs.

Omaha Indian Tribe and United States of America,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF GORDON DAHL AND 81 OTHER FARM OWNERS IN MONONA COUNTY AS AMICI CURIAE

WILEY MAYNE
300 Commerce Building
Sioux City, Iowa 51102

Counsel for Amici Curiae Gordon Dahl, et al.

(Names of 82 Amici listed inside of cover)

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

Names of Amici submitting this Brief

Gordon Dahl, Barbara Dahl, Clara Grace Dahl, Vasco Boulden, Mrs. Howard (Edna Boulden) Miller, Ethel Parks, Myrtle G. Riggs, Florence Ellen Boulden, Cleo Cox, Ethel McCoy, John K. Craford, M. George Craford, Rose Ann Kane, Ruth Craford, Gladys Durr, Bertha Kirk, John H. Lund, Ruth J. Lund, Harriet Kirk, Arthur Orr, Robert Orr, George C. Ruth, Anena Ruth, Richard A. Ruth, Jean M. Ruth, Ferd Stangel, W. W. Virtue, Ariel Virtue, Richard L. Anderson, Karen Anderson, Hazel Clark, Chris Christensen, Harold B. Dufrene, Doris Dufrene, R. J. Everett, Myrva Everett, Alma Schmidt Henderson, J. B. Hicks, Trustee for Mildred C. Hicks, James Kent, Sue Kent, Lorraine Kutzler, Wallace G. Parker, Nadine Parker, Alice Parker, L. S. Raines, Donald L. Rupp, Roy R. Rupp, Lillian C. Rupp, Don E. Ruth, Joyce M. Ruth, Edna J. Sponder, Lillie Mae Stevens Estate, Roy T. Sorensen, Wilbur L. Stokley, Dan K. Weaver, Charles H. Truelsen, Duane J. Dowd, Donna C. Ford, Ray L. Grosvenor, Hazel I. Jacobson, Joan S. Jacobson Jensen, Wm. S. Jacobson, Minnie Marble, Harold Queen, Maude Seubert, John M. Ropes, Clyde H. Rush, Ethel Swan, Glen Swan, Grace Swan, Elmer Swan, Dorothy Weidner, Virginia Burns, Rose Loraditch, Mary Brennan, Phylis Nelson, Leslie Hickman, Shirley Fender, Robert Hickman, Dorothy Queen, Norman Queen and Charlotte J. Clark.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

In The

Supreme Court of the United States

October Term, 1978

—o—

No. 78-160

—o—

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, Darrell L., Harold, Harold M. and Luea Sorenson,

Petitioners,

No. 78-161

R. G. P. Incorporated, Otis Peterson, and Travelers Insurance Company,

Petitioners,

No. 78-162

State of Iowa and State Conservation Commission of the State of Iowa,

Petitioners,

vs.

Omaha Indian Tribe and United States of America,

Respondents.

—o—

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

—o—

BRIEF OF GORDON DAHL AND 81 OTHER FARM OWNERS IN MONONA COUNTY AS AMICI CURIAE

—o—

The 82 individual farm owners whose names are listed inside of the cover respectfully submit this brief as *amici curiae* in support of the petitions for writ of certiorari filed in this case on behalf of petitioners Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, Darrell L., Harold, Harold M. and Luea Sorenson, R. G. P. Incorporated, Otis Peterson, Travelers Insurance

Company, State of Iowa and State Conservation Commission of the State of Iowa. All parties have signed a written consent to the filing of this brief pursuant to Rule 42.2.

—o—

STATEMENT

These amici adopt the sections of the Petition of Petitioners Wilson, Lakin, Jackson and Sorenson setting forth Opinion Below, Jurisdiction, Questions Presented, Constitutional and Statutory Provisions Involved and Statement of the Case. These amici supplement said Petition with a statement of their interests in this case and of their reasons this Court should grant the Petitions and review the decision of the 8th Circuit Court of Appeals.

—o—

STATEMENT OF INTERESTS OF AMICI CURIAE

These amici own 35 Iowa farms (approximately 6,500 acres) lying to the east, north and south of the 2,900 acres in the instant case. Substantially all of their land lies outside the Barrett Survey of 1867 which the parties agreed accurately prescribed the boundaries of the 2,900 acres in the original reservation. The district court severed the 2,900 acres within the Barrett Survey for the separate trial which has been held in the instant case, and the Tribe's claim to amicis' 6,500 acres will be tried after final determination of the instant case.

Amici are individual family farmers whose tracts claimed by the Tribe average 186 acres in size. Most of their land has been owned by their families for generations, some by patent direct from the U. S. in the 19th century.

Their ancestors settled, cleared, and developed these farms, which the families have continued to improve, cultivate and pay taxes on ever since. Their titles and right to possession were never challenged by the Tribe until the filing of the instant suit. (The United States is not a party against these amici, having brought suit only as to the 2,900 acres in the original reservation.) Through the years these families have bought and sold portions of their farms from and to each other, and have borrowed and made loans on such lands, all in reliance on fully established records of title. Under careful husbandry, progressive farming practices and inflation their fertile land has steadily increased in value until, immediately before the decision of the Circuit Court, their best informed appraisal of its average reasonable market value was $2,000 per acre. ($13,000,000 for their combined 6,500 acres.)

The decision of the 8th Circuit Court of Appeals on April 11, 1978 cast a redoubtable cloud on amicis' title which has resulted in serious disruption of long existing economic, financial and social relationships affecting not only these amici but the entire agricultural community. Prospective purchasers are now reluctant to buy and lending institutions unwilling to make loans on land which was in great demand prior to April 11. Land values have already declined. Normal commerce is inhibited as the community seeks to assess the impact of a decision which

seems to set long recognized laws of accretion and avulsion topsy-turvey and to hold that no white citizen will be secure in his property if it is claimed by an Indian or Indian tribe.

It is true the judgment of the Circuit Court states its application of § 194 placing the burden of proof on the defendants in the instant litigation is not controlling as to amicis' land outside of the Barrett Survey and the original reservation. (App. A66, footnote 69 continued from previous page.) It noted the same proof showing presumptive title to the reservation (2,900 acres) cannot govern any future litigation concerning the lands outside that area. However, the same footnote states "nor do we foreclose the right of the plaintiffs to urge that § 194 is applicable under different proof." These amici must therefore anticipate the Tribe will attempt to use the Circuit Court's application of § 194 against them in the case yet to be tried if the decision is not reversed. This alone gives amici a strong and compelling interest in the granting of a writ of certiorari to review the constitutionality of § 194 as construed and applied by the 8th Circuit.

Amici also have a direct immediate interest in a review of those portions of the decision which ignore or depart from well established principles of the law of accretion and avulsion. E.g. the U. S. Supreme Court as well as circuit courts of appeal and the Supreme Courts of Iowa and Nebraska have uniformly held that to prove an avulsion there must be evidence of identifiable land remaining in place after the avulsion. The 8th Circuit opinion failed to enforce this long established requirement of identifiable land in place, dismissing it with the bare state-

ment: "little significance can be attached to its alleged absence under the evidence adduced in the present case" (App. A42). These amici intend to prove the absence of identifiable land in place and to disprove avulsions thereby as an integral part of their own defense. Approximately one third of their land lies just outside the 2,900 acres in the instant case. It is reasonable to anticipate the evidence of absence of identifiable land in place as to such land will be substantially the same as that introduced in the instant case. Thus it is of crucial importance to these amici that a writ be granted to determine whether the absence of identifiable land in place still negates avulsion as repeatedly held by this Court or whether the 8th Circuit's rejection of the identifiable land in place requirement shall stand as the law of the case.

For the above reasons, the farmers for whom this brief is filed as friends of the court have an immediate and direct interest in the case and have an even larger stake in the granting of a writ of certiorari than do petitioners themselves. Review by the Supreme Court is of crucial importance not only to petitioners and these amici, but to everyone presently claiming land which was ever owned, occupied, hunted or fished by individual Indians or Indian tribes from time immemorial in what is now the United States.

The 8th Circuit's application and interpretation of 25 U. S. C. § 194 imperils long established ownership of private and public held land throughout our country. When land titles and values are threatened by judicial fiat, the judicial action causing such widespread uncertainty and economic loss should be reviewed at the highest level, not left to an intermediate court.

REASONS FOR GRANTING THE WRIT

1. The decision below raises a serious issue as to the constitutionality of 25 USC § 194 which has never been passed upon by this court. Determination of whether the statute is or is not constitutional affects and may prove decisive of the rights of all citizens on both sides of major Indian land claims throughout the United States. It is a question of great national importance which should be settled at the highest judicial level.

The ancient code section resurrected by the 8th Circuit to discriminate against petitioners reads as follows:

> "25 U. S. C. § 194. Trial of right of property; burden of proof
>
> 'In all trials about the right of property in which *an Indian* may be a party on one side, and *a white person* on the other, the burden of proof shall rest upon *the white person*, whenever *the Indian* shall make out a presumption of title in himself from the fact of previous possession or ownership.'" Emphasis ours.

This Court has never passed upon the constitutionality of § 194 in the 144 years since it was enacted. Nor did the Circuit Court give any serious consideration to the constitutional question, disposing of it in a single footnote (App. A20) citing one case which is not in point *Morton v. Mancari*, 417 U. S. 535, 554-555 (1974). The opinion assumed § 194 is constitutional and then used it to switch the burden of proof from plaintiffs to defendants. Such interpretation and application of the statute effectively

delivered the case into plaintiffs' hands. It was discrimination proscribed by the Constitution in that it was based solely on race and therefore denied defendants Due Process and Equal Protection of the Laws in violation of the Fifth and Fourteenth Amendments. The decision's application of the statute also places these amicis' land in jeopardy. If not reversed it will make their defense much more difficult as set forth in the Statement of Interests of Amici Curiae, supra. However, the impact of the decision below assuming § 194 to be constitutional and using it to foreclose the case against petitioners extends far beyond petitioners in the instant case and these amici in the next. Which ever way the question of constitutionality is resolved, the answer will have a direct impact on all claims for lands already asserted or to be asserted by Indians or Indian tribes anywhere in the U. S. A statute largely unnoticed by this court and lower courts since 1834 is suddenly catapulted into a position of crucial significance in the determination of far flung claims involving vast areas of valuable land from Maine to California. If left standing, the decision below will encourage the proliferation of additional Indian claims and provide widely-applicable precedent stacking the deck aginst any white person who finds himself the target of such claims.

Amici respectfully submit the petition should be granted to review § 194 and its application which they believe to be unconstitutional in the following respects:

The plain meaning of the words of § 194 can only be to discriminate in favor of an Indian against a white person. No twisting of semantics can give them any other meaning. The section is therefore a denial of equal pro-

tection and due process on its face, and the only question remaining is whether it can somehow be justified. We cannot believe such manifestly discriminatory language met constitutional standards even when it was enacted in 1834, although such may have been arguable under then existing conditions. But absolutely no justification for such invidious racial discrimination has been shown in the instant case or can be shown to uphold the statute today. As stated by Mr. Justice Powell in his opinion announcing the judgment of the Court in the Bakke case:

> "The clock of our liberties * * * cannot be turned back to 1868 * * *. It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." Regents of California v. Bakke, — U. S. —, 98 S. Ct. 2733, p. 2751 (1978).

And further at p. 2757:

> "Preferring members of any one group for no reason other than race or ethnic origins is discrimination for its own sake. This the Constitution forbids."

The opinion below makes no pretense of meeting the constitutional requirements enunciated in Bakke in the following excerpts from the opinion of Justices Brennan, White, Marshall and Blackmun:

> "a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." at p. 2782 and "In sum, because of the significant risk that racial classifications established for ostensibly benign purposes

> can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such classification an important and articulated purpose for its use must be shown." at p. 2785.

The 8th Circuit neither subjected § 194 to "strict scrutiny" nor found that "it furthers a compelling government purpose" or "important and articulated purpose". It merely cited language from *Morton v. Mancari* as a basis for *assuming* that the special treatment accorded plaintiffs by § 194 is justifiable in the instant case (App. A20, footnote 18).

It did *not explain* nor is there any way it could explain how such special treatment "can be tied rationally to the fulfillment of" any "unique obligations toward the Indians" which Congress might or might not have in the instant case. There was no showing here, as required in *Mancari* that "the preference is reasonably and directly related to a legitimate, non-racially based goal". There was no finding similar to that in *Mancari* "that the preference was not racial at all" but "an employment criterion reasonably designed to further the cause of Indian self-government." *Morton v. Mancari*, 417 U. S. 535, 554-55 (1974).

It is clear from Mr. Justice Powell's discussion of *Mancari* in *Bakke* at p. 2756, n. 42 that *Mancari* is in no way supportive of § 194.

The 8th Circuits' ill conceived misapplication of *Mancari* to uphold § 194 standing alone would call for review of the section's constitutionality by this Court. A writ of certiorari should also be granted because the decision be-

low departs from numerous other decisions of this Court barring racial discrimination in federal statutes.

Bolling v. Sharp, 347 U. S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954).

Weinberger v. Wiesenfeld, 42 U. S. 636, 43 L. Ed. 2nd 514, 95 S. Ct. 1225 (1975).

Washington v. Davis, 426 U. S. 229, 240 48 L. Ed. 2nd 597, 607, 96 S. Ct. 2040 (1976).

2. The decision below denies petitioners due process by ignoring the well established principle that avulsion cannot occur in the absence of identifiable land in place continuing after the avulsion. Certiorari should be granted to enable the court to reaffirm or reject its requirement of identifiable land in place in previous decisions.

The question to be decided in riparian land litigation is frequently whether accretion or avulsion has taken place. This was certainly true in the instant case where most of the evidence derived from plaintiffs' attempts to prove avulsion and defendants' attempts to negate it.

From at least as early as the eighteenth century, when so stated by Vattel, the doctrine of avulsion has been held not to be applicable in the absence of identifiable land in place continuing after the avulsion.

Emmerick Vattel, The Law of Nations, Principles of Natural Law applied to the Conduct of Nations and Sovereigns (publ. 1758), Book 1, Chap. 22, §§ 268-70.

The requirement of identifiable land in place has been upheld in numerous decisions of this court:

Nebraska v. Iowa, 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892).

Oklahoma v. Texas, 260 U. S. 606, 637, 67 L. Ed. 428, 435 43 St. 221 (1922).

Louisiana v. Mississippi, 384 U. S. 24, 16 L. Ed. 2nd 330 86 S. Ct. 1250 (1966).

Mississippi v. Arkansas, 415 U. S. 289, 291, 39 L. Ed. 2nd 333, 339 94 S. Ct. 1046 (1974).

Oregon v. Corvallis Sand & Gravel Co., 429 U. S. 363, 375, 50 L. Ed. 2nd 550, 561, 97 S. Ct. 502 (1977).

The Supreme Courts of Iowa and Nebraska have also consistently held there can be no avulsion in the absence of identifiable land in place.

Coulthard v. Stevens, 84 Iowa 241, 50 N. W. 983 (1892).

Kitteridge v. Ritter, 172 Iowa 55, 151 N. W. 1097 (1915).

Wilcox v. Pinney, 250 Iowa 1387, 98 N. W. 2nd 720, 723 (1959).

Sieck v. Godsey, 254 Iowa 624, 118 N. W. 2nd 555 (1962).

Iowa Railroad Land Co. v. Coulthard, 96 Neb. 607, 148 N. W. 328 (1914).

Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647 (1935).

Conkey v. Knudson, 143 Neb. 5, 8 N. W. 2nd 538 (1943).

Courts and litigants throughout the U. S. have relied on the above decisions and similar decisions in other states. Until the decision of the Circuit Court in the instant case, the requirement of identifiable land in place has been widely accepted as a reliable standard giving stability to riparian land titles and claims everywhere. Even the

Tribe conceded the necessity of showing identifiable land in place in the instant case, contending on appeal that the district court had erred in finding the Tribe's evidence did not meet such requirement. The 8th Circuit then surprisingly abandoned the identifiable land in place requirement on its own initiative with no explanation other than the unsupported statement "little significance can be attached to its alleged absence under the evidence adduced in the instant case" (App. A42).

Such cavalier treatment of a well established principle of the law of accretion and avulsion deprived petitioners of their property without due process. These amici and others whose rights rest in part on the absence of identifiable land in place will also be denied due process if this portion of the decision below is permitted to stand as the law of the case. A writ of certiorari should be granted to enable this Court to review whether the absence of identifiable land in place is of "little significance" or is still a fundamental prerequisite of avulsion as previously held by this Court.

———o———

CONCLUSION

For the foregoing reasons, the petitions in this case should be granted.

Respectfully submitted,

WILEY MAYNE

300 Commerce Building
Sioux City, Iowa 51102

Counsel for Gordon Dahl and 81 other Farm Owners in Monona County as Amici Curiae